

White Paper: Understanding the Effects of I-161

**Prepared by the Montana Outfitters and Guides Association, at the
request of Rep. Elsie Arntzen (R-Billings)**

Synopsis

On November 2, 2010 53% of Montanans voting on Initiative 161, in 52% of the counties, approved the initiative labeled "Change how hunter access programs are funded." Sponsor Kurt Kephart touted the measure as a way to prevent the commercialization of wildlife, increase funding for Block Management, provide greater access to private lands, provide equity for all nonresidents, and eliminate the guaranteed income enjoyed by the outfitting community. Others, less well informed, were sure the measure would mean more equitable treatment for resident hunters in drawings for licenses and special permits (Missoulian Editorial Board).

In the balance are the 2,300 Montana jobs, \$11.6 million in state and local taxes and \$67 million in tourism related commerce generated by the 400 small businesses hit hardest by I-161.

What does I-161 really do and what are the possible effects of this new law? The following salient facts are taken from the eight-page document (5,244 words) provided by the secretary of state. I-161:

- Eliminates the outfitter sponsored license (OSL) as provided by 87-1-268;
- Eliminates language that requires the outfitter operating under the OSL to:
 - "accompany the applicant;
 - "provide guiding services for the species hunted by the applicant;
 - "direct the applicant's hunting for all big game [elk and deer] . . .
 - "submit to the department . . . complete records of who hunted with the outfitter, where they hunted, and what game was taken."
- Eliminates the requirement that any permits or tags a nonresident secures as a result of holding an outfitter sponsored license are valid only when hunting under the control of an outfitter.

- Increases the number of licenses in the general drawing category from 11,500 to 17,000 elk/deer combination (B-10) and the number of unreserved (drawing) deer combination licenses (B-11) from 2,300 to 4,600. B-11 licenses reserved for landowner-sponsors remain at 2,000.
- Establishes the price of nonresident hunting licenses, an act previously reserved for the Legislature.
- Increases the price of the B-10 from \$628 to \$897 (43%) and the B-11 from \$328 to \$527 (61%). Additional fees: \$5/drawing and \$10/hunting access enhancement fee. First year total prices: \$912 and \$542.
- Increases these base prices annually by the Consumer Price Index-Urban.
- Eliminates the FWP Commission authority to allocate any portion of separated Class B-7 or Class B-11 licenses to the outfitter sponsored category.
- Establishes a hunting access account that **may only be used** to fund any hunting access program established by law or Administrative Rule. The following funds must be deposited in the account:
 - 25% of the fee for the sale of both B-10 and B-11 licenses;
 - 25% of the fee for hunting licenses issued to nonresident children of a resident pursuant to 87-2-514;
 - the hunting access enhancement fees assessed pursuant to 87-2-202(3)(c) and (3)(d); and
 - any interest or income earned on the account.
- Effective March 1, 2011

Given the widespread misinformation about the practical effects of I-161, the actual effects should be of interest to sportsmen, landowners, business owners, legislators, outfitters, and the tourism industry. Following the election, many landowners, angry at a perceived threat to their ability to make their own management decisions regarding hunting opportunities, closed many thousands of acres to the hunting public. Others began charging an access fee.

Outfitters, faced with reality that the fate of all their contracted clients will be determined by a lottery, are scrambling to adjust their business models. Many are over-booking clients, hoping to draw the number they need. Many are looking for

additional leases in the event the drawing awards them with more clients than they can handle. Landowners are quickly becoming aware of the leasing power of a five-party group of nonresident hunters and weighing the advantages over enrollment (or continued enrollment) in the Block Management program. Already, some landowners are raising the lease price on their outfitter by as much as 60%, knowing that when the outfitter pulls out, the ranch is available to those with more money.

An unintended consequence clearly missed by supporters of I-161 is the fact that approximately 7,800 nonresidents previously strictly controlled by their sponsoring outfitter under the OSL will no longer be prohibited from hunting on their own. Beginning with the 2011 hunting season, these hunters will be free to compete with resident hunters throughout the season, across the state, on Block Management, state, federal lands, and private lands. Without the strict controls of the OSL, these nonresidents become unrestricted hunters. They may still hunt under the supervision of an outfitter, but when the contracted service is complete, they are free agents.

As for the Block Management program, if all nonresident licenses sell, as predicted by the Dept. of Fish, Wildlife and Parks, there will be more funds for a program enjoyed a \$2.5 million surplus (and spending authority) from the 2009 Legislature. Apparently, none of those funds were spent for additional BM cooperators for the 2009 or 2010 hunting season, but instead spent \$1.5 million on fee acquisition of property in FWP Region 2. The questions must be asked:

- "Did this program need additional funds to provide more landowner cooperators, thus providing greater access?"
- "Were any qualified landowners unable to enroll in the program for the 2009 and 2010 hunting season because of a shortfall in funding?"
- Was it an error of law to use Block Management funds on fee title acquisition of property?

Understanding the Outfitter Sponsored License

Legislative History

Record of Nonresident Big Game Hunting License, Set-Aside License, Evolution to the Outfitter Sponsored License

- The 17,000 limit on nonresident elk combination licenses was adopted by the 1975 Legislature.
- This limit, the higher license fee for nonresidents, and the restriction of nonresidents to an elk combination license was challenged in federal court on constitutional grounds by an outfitter and a number of nonresident hunters. The case was eventually decided by the United States Supreme Court with the Court holding that the limitations were constitutionally valid. Baldwin v. Fish & Game Comm'n, 436 US 371 (1978).
- In December 1985, the FWP Commission adopted an annual rule proposed by the Department that established the outfitter set-aside of 5,600 of the elk combination licenses as part of the 17,000 licenses. The remaining 11,400 were reserved for those who did not wish to utilize the services of an outfitter. All licenses were subject to a drawing in the event of an oversell.
- Montana Wildlife Federation challenged the rule in court. The state district court in February, 1986, denied a preliminary injunction that would have stopped the sale of the new set-aside licenses for outfitters (February, 1986) and later dismissed the litigation as moot (October, 1986). Montana Wildlife Federation v. Flynn, Cause No. ADV 86-96 (1st Judicial District).
 - FWP arrived at 5,600 as an average of the number of outfitter clients served between 1982 and 1985.
 - FWP saw the set-aside as an off-set for three rule changes that resulted in **"unintended harm to the outfitting industry."** The rule was temporary until the 1987 Legislature could address the "recognized inequities." FWP brief in support of motion for summary judgment.
 - FWP further found that "since it is the policy of Montana to foster small and medium-sized businesses that help build the economy of the state, especially those that provide employment for Montanans, the

Department believes that allocating a block of licenses to nonresidents who have retained outfitters services is furthering this policy." FWP press release "Nonresident big game license sale procedures for 1986" by Ron Aasheim. Oct. 18, 1985.

- **Court supported furthering "[the state] policy . . . of fostering the business of outfitting . . . and to permit the planning of 1986 hunts by outfitters and hunters with a minimum of uncertainty."**
- Court referred to the Baldwin Court, which "recognized that Montana licensed outfitters occupy a singular position under state law [in that] the "equal responsibility statute" has the following consequence: "The outfitter thus in a sense is a surrogate warden and serves to bolster the state's warden force. This appears to me to be another reason the state might have to provide for the economic validity of outfitters." Decision by Judge Loble. Feb. 2, 1986.
- In 1987 the Montana Legislature established the 5,600 outfitter set aside licenses in law and established for the first time a pool of 6,000 nonresident deer combination licenses to be divided equally between outfitted clients, the general nonresident public, and landowners to sponsor hunters on their deeded land.
- In 1993 the Montana Legislature passed a resolution (HJR 24) establishing the Private Land/Public Wildlife Council (PL/PW). The PL/PW was directed to address the interests of hunters, landowners and outfitters and the continuing debate about access to private land and the public's ability to pursue public wildlife. The PL/PW represented landowners, sportsmen, and outfitters. It included a member of the Montana House and Senate, Dept. of State Lands, FWP Commission, U.S. Forest Service and BLM.
- The PL/PW, under the leadership of Nina Baucus, a Wolf Creek rancher, was appointed by then-Gov. Mark Racicot and organized in summer, 1993. The PL/PW met regularly and in October 1994, finalized its recommendations for the 1995 Legislature. All decisions were based on group consensus whereby each member agreed on the final recommendations.

- In 1995 the Montana Legislature passed legislation (HB 195) based on the PL/PW's recommendations. HB 195 created market-based, variable priced, guaranteed big game combination and deer combination licenses for the clients of outfitters, known as the outfitter sponsored license (OSL). Nonresidents hunting with an OSL were prohibited from hunting big game outside the confines of his/her sponsoring outfitter.
- Licenses are distributed through a system whereby the FWP Commission annually adjusts the price and target number of licenses to be sold in an effort to sell an average of 5,500 big game combination and 2,300 deer combination licenses annually over a five year period. Each five-year period is unaffected by previous five-year periods.
- HB 195 established the enhanced Block Management program to be funded by the difference between the market-prices OSL and the general draw license.
- HB 195 included several other provisions. Specifically, it:
 - stipulated that any permits or tags obtained as a result of holding an outfitter sponsored license are valid only when hunting under the conduct of an outfitter;
 - decreased the 1987 set aside of 5,600 (B-10) to 5,500 and increased the 2,000 (B-11) to 2,300;
 - provided for a five-year moratorium on the issuance of new land-based hunting outfitter licenses. The moratorium was later allowed to sunset as an unnecessary act (the quota was never reached).

Subsequent legislative actions continued to support and enhance the program recommended by the Private Land/Public Wildlife Council and established in law by HB 195 in 1995

1999 Session: SB 338 in part (Mesaros) (83% approval)

- Expands funding for the program through an increase in the cost of the nonresident upland game bird license and allocation of the increase (\$55) to the program established in 87-1-265 through 87-1-267;

- Enhances "moratorium" language from HB 195 to establish a cap of 543 licenses for land-based hunting outfitters to terminate March 1, 2006.
- <http://data.opi.mt.gov/bills/2005/billhtml/SB0077.htm>

2001 Session: SB 285 (McNutt) (80% approval)

- Provides new funding sources through hunting access enhancement fees whereby the first time a wildlife conservation license is purchased as a prerequisite to purchase a hunting license, residents will pay an additional \$2 and nonresidents will pay an additional \$10.

<http://data.opi.mt.gov/bills/2001/billhtml/SB0285.htm>

2005 Session: SB 77 (Hansen) (97% approval)

Removes the sunset from the hunter management and hunting access enhancement program, making all parts of the program established by HB 195 (1995 Legislature) permanent, including:

- Incentives to landowners for providing free hunting access;
- Restrictions on landowner liability for allowing hunting;
- Outfitter sponsored license;
- Funding sources from various license fees;
- The Private Lands/Public Wildlife Council; and
- Biennial reports to the governor and legislature.

<http://data.opi.mt.gov/bills/2005/billhtml/SB0077.htm>

2005 Session: HB 235 (Lange) (87% approval)

- Expands funding for the program and FWP law enforcement through a "Super Tag" lottery in which one (each) deer, elk, shiras moose, mountain sheep, and mountain goat license is issued. The Commission establishes the rules, price, and use of the proceeds.
- Expands the benefit of a free Class III combination sports license for resident landowners, or B-10 big game combination license for nonresident landowners enrolled in the Block Management program to allow an immediate family member as a substitute for the landowner; and
- Requires the PL/PW to report to the legislature each session regarding various elements of the hunter enhancement program.

<http://data.opi.mt.gov/bills/2005/billhtml/HB0235.htm>

2009 Session: HB 137 (McNutt) (97% approval)

- Allows an employee to receive the benefit of a free Class III combination sports license for resident landowners, or B-10 big game combination license for nonresident landowners enrolled in the Block Management program. The employee must be engaged in the farm or ranch operation full-time and year around. <http://data.opi.mt.gov/bills/2009/billpdf/HB0137.pdf>

2009 Session: HB 585 (McClafferty) (74% approval)

- Recommended by the PL/PW and called the "Come Home to Hunt" bill.
- Establishes 500 B-10 (elk combination) and 500 B-11 (deer combination) licenses reserved for adult nonresident family members who will hunt accompanied by a licensed Montana relative within the second degree of kinship.
- Applicant must have completed a Montana hunter safety course by March 1, 2010 or have previously purchased a resident hunting license.
- Applicants who fail to draw a license will be entered in the general drawing.
- Price is the same as that for nonresidents in general draw categories (\$628 and \$328). These prices were raised by I-161.
- Revenue is directed to the acquisition of public hunting access to inaccessible public land.
- Program will sunset March 1, 2014, unless adopted by the 2013 Legislature.
- <http://data.opi.mt.gov/bills/2009/billpdf/HB0585.pdf>

Conclusions

Clearly, the original Private Lands/Public Wildlife Council, the courts and past legislative leaders have acknowledged the unique business model of the outfitting industry:

- In no other industry does Montana limit the size of the market (17,000 nonresident licenses).
- In no other industry is the privilege of serving customers contingent upon them having to win in a lottery before the service can be provided.
- Like any industry a stable business climate promotes long term commitments, high quality service, and sustainable jobs. Instability, as brought on by a lottery system, leads to short term management approaches attractive only as high risk ventures where quality of service eventually

suffers and quality of operator diminishes, all of which reflects poorly on Montana's tourism industry.

The outfitter sponsored license provided a measure of stability and an environment where a small business had a chance to succeed on the merit of its service. In such an environment, banks make small business loans, investment capital can be attracted and a segment of the tourism industry was sustainable. As it stands now the only certainty is that this industry faces an uncertain future and the presumed "benefits" from this change are just as uncertain. Passage of I-161 will prove to be the catalyst for less hunter access, more exclusively leased property and fewer jobs for Montanans.

Finally, the concerns Montana legislators now have for the Medical Marijuana Initiative is an example of effects that are revealed as time passes. I-161 should be carefully monitored to ensure it produces the results claimed by its proponents.

Contact Information:

Mac Minard, Executive Director
439-2053

Jean Johnson, Lobbyist
458-6363
439-7503 (cell)